

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

GUY NIELSON,

Plaintiff

-vs-

NO. 3:CV-05-2434

DOROTHY B. ANTONE, GREAT
WEST INSURANCE COMPANY,
PROGRESSIVE CASUALTY
INSURANCE COMPANY,

(Judge Kosik)

Defendants

MEMORANDUM

This matter is before us on the motion of defendant Progressive Casualty Insurance Company to dismiss the action for lack of diversity pursuant to Fed.R.Civ.P. 12(b)(1).

Background

Plaintiff Guy Nielson commenced this tort action against Dorothy Antone based on diversity of citizenship; plaintiff being a resident of Nebraska and the defendant a resident of Pennsylvania. An amended complaint was filed based on diversity, adding Great West Casualty Insurance Company with a Nebraska address, and Progressive Casualty Insurance Company with an Ohio address. Great Western filed an Answer admitting its address. Progressive filed the present motion which has been briefed by Progressive and plaintiff.

Discussion and Conclusion

The initial thrust of the motion to dismiss is that while plaintiff bases his action on diversity under 28 U.S.C. §1332, plaintiff and defendant Great Western are both from Nebraska. Under the amended complaint, in the plain language of the statute, the "matter in controversy" could not be "between . . . citizens of different states" since citizens of Nebraska would be on both sides of the litigation.

The fact that the non-diverse defendant has not raised the issue of diversity is of no significance. A challenge to subject matter jurisdiction cannot be waived. Indeed, cases make it clear that “[i]t is common ground that in our federal system of limited jurisdiction any party or the court sua sponte, at any stage of the proceedings, may raise the question of whether the court has subject matter jurisdiction; and, if it does not, dismissal is mandatory. Fed.R.Civ.P. 12(h).” *Manway Const Co. v. Housing Auth. of City of Hartford*, 711 F.2d 501, 503 (2d Cir. 1983).

For the foregoing reasons, the motion to dismiss is **GRANTED**.

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ORDER

AND NOW, THIS 30th DAY OF AUGUST, 2006, IT IS HEREBY ORDERED that the defense motion to dismiss is **GRANTED**. The Clerk of Court is directed to **CLOSE** this case.

s/Edwin M. Kosik
United States District Judge